Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL MEDJUCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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QUESTION PRESENTED.

I. In a prosecution of a non-resident alien for distribution of drugs on board a foreign-flagged vessel on the high seas, in violation of 46 U.S.C. § 1903, do the due process clause of the Fifth Amendment and the Sixth Amendment right to trial by jury require the government to prove to a jury that there was a "nexus" between the high-seas drug shipment and the United States.

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OPINION BELOW.

The decision of the Court of Appeals for the Ninth Circuit is reported as *United States* v. *Medjuck*, 156 F.3 916 (9th Cir. 1998) and is reproduced in the Appendix ("App.") at App. 1a-11a. It is henceforth referred to from time to time as "*Medjuck II*," since there was an earlier appeal in this case to the Ninth Circuit which needs to be discussed further below

for background purposes. This earlier appeal will be cited below and then referred to as "*Medjuck I.*"

JURISDICTION.

The decision of the Court of Appeals was filed on September 3, 1998. A timely petition for rehearing with suggestion for rehearing *en banc* was filed; it was denied by order dated March 15, 1999. (App 12a-13a.) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED.

This petition challenges the conviction of the petitioner under Title 46 U.S.C. § 1903, (the Maritime Drug Law Enforcement Act ("MDLEA")), because the question of whether there was a "nexus" between the drug shipment involved and the United States was not presented to the jury for its consideration.

Pursuant to Rule 14(1)(f) of the Supreme Court Rules, and because of its length, the statute involved, Title 46 U.S.C. § 1903, is set forth *verbatim* in the Appendix at App.14a-19a.

STATEMENT OF THE CASE.

Conviction and Sentence.

Petitioner Michael Medjuck was convicted by a jury of conspiring to distribute drugs on the high seas on board a foreign flag vessel named the "LUCKY STAR," in violation of 46 U.S.C. § 1903. He was sentenced to serve a prison term of twenty-four years.

Background.

The factual background is spelled out in the first of two Ninth Circuit opinions in this case:

> The conspirators . . . agreed to secure the Lucky Star, a vessel registered in St. Vincent, a sovereign island nation in the British West Indies. They arranged to have the Lucky Star loaded with the 28 tons of hashish from the Saratoga Success [an earlier failed venture] and an additional 42 tons of hashish from Pakistan.
>
> Meanwhile, Medjuck and others were responsible for securing a ship to rendezvous with the Lucky Star approximately 800 miles northwest of Midway Island, in order to offload and transport the hashish to Canada.

United States v. *Medjuck*, 48 F.3d 1107, 1109 (9th Cir. 1995) ["*Medjuck I*"].

The MDLEA High Seas Charges and the United States-Based Charges.

By a superseding indictment filed in 1992, petitioner was charged with the MDLEA violations (distribution of drugs on the high seas) which are the charges at issue on this petition. In order to be found guilty under the MDLEA, the government must show, *inter alia*, that the drugs involved were found on a vessel "subject to the jurisdiction of the United States." 46 U.S.C. § 1903(a), a phrase sub-defined under the statute as "a vessel registered in a foreign nation where the flag nation has consented to or waived objection to the enforcement of the United States law by the United States." 46 U.S.C. § 1903(c)(1)(C). These are the only charges which survived the long history of this case.

Petitioner was also charged with the usual, garden-variety drug charges, including importation of drugs into the United States (21 U.S.C. § 860), possession of drugs in the United States with intent to distribute (21 U.S.C. § 841), use of the telephone in the United States to facilitate United States-based drug transactions (21 U.S.C. § 843(b)), and travel in interstate commerce to facilitate United States-based drug transactions. (18 U.S.C. § 1952). *All* of these United States-based drug charges resulted in *dismissal* by the district court or by *acquittal* after trial. Indeed, after one lengthy pretrial hearing, the district court presiding over this case found that "the evidence does *not* establish that the conspirators in-

tended the LUCKY STAR'S load of hashish to come to the United States. Instead . . . the conspirators intended to import the hashish into Canada." *United States* v. *Medjuck*, 937 F.Supp. 1368, 1392-93 (N.D. Cal. 1996) (emphasis supplied.)

While the court and the jury thus found petitioner Medjuck *uninvolved* with any drug transaction aimed at or conducted in the United States, he was convicted of the three MDLEA counts charging that he conspired to distribute drugs on the high seas, from Pakistan "to the central coast of British Columbia, Canada. [Superseding indictment ER I, 37.] Petitioner's complaint is that in connection with these MDLEA counts, the district court failed to instruct the jury that before it could convict petitioner, the government had to prove beyond a reasonable doubt that there was a nexus between this Pakistan-to-Canada drug shipment and the United States.

MDLEA and the "Nexus" Requirement.

Because the hashish came from Pakistan, was destined for Canada, and was shipped via the high seas on a foreign flag vessel, petitioner (a non-resident alien operating from his home in Canada) challenged the constitutionality of prosecuting him in the United States courts without requiring the government to prove a sufficient connection ("nexus") between his conduct and the United States. Petitioner argued that without such a nexus it would violate his due process rights to be haled into our courts for criminal prosecution. The district court rejected this argument, holding that no nexus was required.

Petitioner then entered a plea of guilty with the condition that he be allowed to appeal the district court's rejection of his due process challenge. On that appeal, the Ninth Circuit reversed the district court:

> The trial court denied defendants' request for an evidentiary hearing on their jurisdictional challenges, and ruled that the questions regarding jurisdiction would not be submitted to the jury.
>
> ***
>
> We agree that the district court erred by not submitting the jurisdictional element of the crime to the jury and by not requiring the government to demonstrate a sufficient nexus between the defendants and the United States to satisfy due process.

Medjuck, 48 F.3d at 1110, 1111. [This first *Medjuck* decision rendered by the Ninth Circuit is referred to as "*Medjuck I*."] *Medjuck I* based its decision upon a series of earlier cases requiring a "nexus" as a precondition to prosecution under the MDLEA:

> In order to apply extraterritorially a federal criminal statute to a defendant consistent with due process, there must be a sufficient nexus between the defendant and the United States, *see United States* v. *Peterson*, 812 F.2d 486,

> 493 (9th Cir. 1987), so that such application would not be arbitrary or unfair.

As more elaborately stated:

> To meet the nexus requirement, the government must show that the plan for shipping the drugs was likely to have effects in the United States. For instance, "where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction." *Id.* at 249 (citation omitted). Further, "[a] sufficient nexus exists where the ship with drugs is bound ultimately for the United States." *United States* v. *Aikens*, 946 F.2d 608, 913-14 (9th Cir. 1990); *United States* v. *Gonzalez*, 810 F.2d 1538, 1542 (11th Cir. 1987) (sufficient nexus under section 1908's predecessor, 21 U.S.C. § 955(a), requires "that the [ship's] intended destination was the United States or that the crew members' purpose was to send [the drugs] into this country") (citation omitted).

United States v. *Kahn*, 35 F.3d 426, 429 (9th Cir. 1994).

Proceedings on Remand After Reversal.

On remand after the *Medjuck I* reversal, petitioner readied the case for trial and asked the court to settle a jury instruction that enabled the jury to properly consider the "nexus" issue along with the other factual matters submitted to it. As authority, petitioner cited (1) the time honored practice of submitting to the jury all factual issues relating to guilt or innocence (2) the language of *Medjuck I*, and (3) a Ninth Circuit case following *Medjuck I* which explained:

> In *Medjuck*, we held that whether a vessel is within the jurisdiction of the United States — an element of a maritime drug statute — required a factual determination as to whether there was a nexus between the United States and the defendants. The court erroneously made that determination as a matter of law. It should have instructed that the jury must find nexus in order for the court to have jurisdiction.

United States v. *Amparo*, 68 F.3d 1222, 1226 (9th Cir. 1996).[1]

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[1] In an unpublished opinion relating to a co-defendant in petitioner Medjuck's case, the Ninth Circuit wrote that "We reversed in *Medjuck* because the district court failed to instruct the jury to establish the statutory and constitutional jurisdictional requirements for conviction under the MDLEA." *United States* v. *Ainge*, No. 94-10589 *slip op.* at 2 (9th

Despite this authority, the government vigorously resisted a jury submission on the question of nexus. The district court sustained the government's objection, refused to submit the nexus issue to the jury, and then proceeded itself to decide the factual question of nexus. The district found that nexus existed[2] and then submitted the other factual issues to the jury. Petitioner was acquitted of all other charges (where, incidently the jury had the question of whether petitioner was involved with drug activity in or aimed at the United States), but petitioner was found guilty of conspiring to distribute drugs on the high seas from Pakistan "to the central coast of British Columbia, Canada." [Superseding Indictment ER I, 37.]

Medjuck II Affirms the District Court.

In a brief passage without explanation, the Ninth Circuit approved the district court's refusal to submit the factual question of nexus to the jury:

Cir. April 2, 1996). This opinion was permissibly relied upon below as emanating from the same case. Ninth Cir. Local Rule 36-3.

[2] The district court made its nexus finding in a published opinion, *United States* v. *Medjuck*, 937 F.Supp. 1368 (N.D. Cal. 1996), which found that while the drugs were not intended for the United States, the conspirators plotted the drug venture from U.S. soil and that some of the drugs might cross Canada to the east and then trickle to the United States.

> We recently concluded that nexus is not an element of the offense and that nexus is properly decide by the judge. See *United States* v. *Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998). Thus, the district court did not err by deciding the nexus issue instead of submitting it to the jury.

United States v. *Medjuck*, 156 F.3d 916, 918 (9th Cir. 1998) ["*Medjuck II*"].

Petitioner's conviction on the MDLEA counts, rendered without jury consideration of the nexus issue, thus stands. Having plucked this Pakistan-to-Canada drug transaction from the middle of the Pacific Ocean, "[T]he government must show that the plan for shipping the drugs was likely to have effects in the United States." *Kahn, supra*, 35 F.3d at 429. With the help of the Ninth Circuit, the government has escaped this obligation, and its fear, of having to prove nexus to a jury beyond a reasonable doubt.

REASONS FOR GRANTING THE WRIT.

CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER NEXUS IS REQUIRED, ITS PROPER DEFINITION, AND WHETHER IT IS A QUESTION FOR THE JURY.

A. *The Need for Clarification by This Court.*

Stripped of all legalese, the MDLEA "nexus" concept is a mess which can only be cleaned up by this Court. There is a threshold conflict as to whether a "nexus" showing is even required. The Ninth Circuit has emphatically and repeatedly insisted that the government must show a nexus.[3] Yet the Third Circuit has explicitly held otherwise:

> We further acknowledge that our conclusion that the government need not establish a domestic nexus to prosecute offenses under the Maritime Drug Law Enforcement Act is not reconcilable with some of the wording in the opinion of the Court of Appeals for the Ninth Circuit in *United States* v. *Davis*. . . .

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[3] *United States* v. *Aikens*, 946 F.2d 608 (9th Cir. 1990); *United States* v. *Davis*, 905 F.2d 245 (9th Cir. 1990), *cert. denied*, 498 U.S. 1047 (1991); *United States* v. *Peterson*, 812 F.2d 486, 493 (9th Cir. 1987); *United States* v. *Kahn*, *supra*; *Medjuck I*, *supra*; *United States* v. *Caicedo*, 47 F.3d 370 (9th Cir. 1995); *United States* v. *Amparo*, *supra*; *United States* v. *Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998); and *Medjuck II*.

> We decline to follow *Davis* as we see nothing fundamentally unfair in applying section 1903 exactly as Congress intended — extraterritorially without regard for a nexus between the defendants conduct and the United States.

United States v. *Martinez-Hidalgo*, 993 F.2d 1052, 1055 (9th Cir. 1993). *Davis, supra*, the case repudiated by the Third Circuit, is of course just one of the many Ninth Circuit cases requiring that a nexus be proved. [See Footnote 3.]

The First Circuit has explicitly noted the conflict between the Ninth and Third Circuits on the nexus requirement and has sided with the Third Circuit: "We decide today that due process does not require the government to prove a nexus between a defendants criminal conduct and the United States in a prosecution under the MDLEA. *United States* v. *Cardales*, 168 F.3d 548, 553 (1st Cir. 1998).

The definition of nexus is likewise muddled. The Ninth Circuit's opinion in *Kahn, supra*, defines nexus narrowly:

> To meet the nexus requirement, the government must show that the plan for shipping the drugs was likely to have effects in the United States.

Kahn, supra, 35 F.3d at 429. Another Ninth Circuit decision defines nexus much more broadly, as:

> a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its own interests.

United States v. *Caicedo, supra*, 47 F.3d at 370. There is a vast difference between the nexus definition of *Kahn* and that of *Caicedo*.

Finally, there is the *intra* Ninth Circuit conflict as to whether the nexus showing must be made to the court or to the jury. While the earlier Ninth Circuit cases held that there was a nexus requirement, none discussed whether it was a question for the jury.[4] *Medjuck I* was the first to do so. It noted that the jurisdictional issues were two in number: (1) whether the vessel on which the drugs were found met the explicitly-stated statutory definition (46 U.S.C. § 1903) of being "subject to the jurisdiction of the United States" (requiring in this case that the foreign flag nation "consent" to the enforcement of U.S. laws on its vessel), and (2) whether the constitutionally superimposed jurisdictional requirement of a nexus could be proved by the government. 48 F.3d at 1109-10. *Medjuck I* then described the district court's resolution of these two jurisdictional issues:

> The trial court denied defendants' request for an evidentiary hearing on their jurisdictional challenges, and ruled that the *questions* re-

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[4] *See, Aikens, Davis*, and *Peterson, supra*, all cited in note 3, *supra*.

> garding jurisdiction would not be submitted to the jury.

Id. at 1110 (emphasis added). It then reversed, holding:

> We agree with the defendants that the government has the burden of demonstrating such a nexus and that the defendants should have the opportunity for rebuttal upon remand.

48 F.3d at 1110 (emphasis added).

After remand, but before petitioner Medjuck's trial, two separate panels issued decisions stating that *Medjuck Panel I* had ruled the nexus issue was for the jury. *Amparo, supra*, 68 F.3d at 1226 (9th Cir. 1995), interpreted *Medjuck I* as holding that the district court in *Medjuck* "should have instructed that the jury must find nexus in order for the court to have jurisdiction." Another panel explained *Medjuck I* as reversing the district court because "the district court failed to instruct the jury to establish the statutory and constitutional jurisdictional requirements for conviction under the MDLEA." *United States* v. *Ainge, supra.*[5]

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[5] As indicated in note 1, *supra*, the *Ainge* opinion, while not published, may be used in this case because it was rendered in the same case. Ninth Circuit Rule 36-3. More importantly, the trial court, in its published opinion explaining why it was ruling that nexus is not for the jury, publicized *Ainge* and then *discussed it extensively for three pages*. *U.S.* v. *Medjuck, supra*, 937 F.Supp. at 1370-72. *Ainge* thus cannot be ignored since it has been brought to life in a published opinion.

On the other hand, *Klimavicius, supra*, the panel decision quite cryptically relied upon by *Medjuck II* for denying petitioner's claim on the appeal here challenged, rules that nexus is for the court, not the jury. Yet *Klimavicius* does nothing to secure or maintain uniformity with *Medjuck I, supra, Ainge, supra*, or *Amparo, supra*. About *Medjuck I, Klimavicius* states simply that "our use of terms may have created confusion . . . because we labeled the jurisdictional requirement "statutory" jurisdiction and the nexus requirement "constitutional" jurisdiction." 144 F.3d at 1257. Complaining about the parsing of jurisdiction into the separate statutory and constitutional components is at odds with *every* nexus decision thus far rendered (all of which explicitly recognize both components)[6], and is even at odds with a sentence found on the very same page of the *Klimavicius* opinion itself which notes that "[N]exus is part of the jurisdictional inquiry". *Id.* at 1257.

Klimavicius ignores *Ainge* altogether, even though (1) *Klimavicius* relies on the district court's decision (937 F.Supp. 1368, *see* note 2, *supra*) which in turn discusses the *Ainge* holding for a full two pages, and (2) the judge authoring the opinion in *Ainge* was a member of the *Medjuck I* panel who, unlike the members of the *Klimavicius* panel, had full access to the lengthy record culminating in the decision.

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[6] See, *Aikens, Davis*, and *Peterson, supra*; *United States* v. *Kahn*, 35 F.3d 426 (9th Cir. 1994); *United States* v. *Caicedo*, 47 F.3d 370 (9th Cir. 1995); *Medjuck I, supra*; *Amparo, supra*; and *Ainge, supra*; all of which had noted these two components before *Klimavicius* was decided.

Further, in order to dispense with the *Amparo* panel's reading of *Medjuck I* to the effect that nexus was for the jury, *Klimavicius* simply and without explanation proclaimed that language in *Medjuck I* "led us to incorrectly conflate jurisdictional terms." *Klimavicius, supra*, 144 F.3d at 1257. This hardly settles the issue for district courts which are required to try MDLEA cases.

Medjuck II likewise harmonizes nothing. It simply adopts, in one sentence the panel opinion in *Klimavicius-Viloria*, *supra*, doing so with no words of explanation, no attempt to explain the language in *Medjuck I*, and with no attempt to make itself consistent with *Ainge*, a panel opinion decided in this very case which explicitly interpreted *Medjuck I* as calling for a jury on the nexus issue and which even the district court thought necessary to discuss in two pages of detail at 937 F.Supp at 1370-73. Likewise, *Medjuck II* did not discuss *Amparo*, the other panel opinion reading Medjuck as requiring a jury to decide the nexus issue.

The above-described disharmony about the jury question alone qualifies this case for review by this Court. Add to this *both* the disagreement over the nexus definition *and* the inter-Circuit dispute as to whether a showing of nexus is even required, and petitioner's case provides this Court with a unique opportunity to clarify the proper use of MDLEA by the government while harmonizing the precise rights of defendants prosecuted under this important and often-used Act.

B. *The Importance of the MDLEA.*

We will always be a maritime nation. The MDLEA will thus always be an integral part of the nations' efforts to curb the drug flow into the United States. The MDLEA, the importance of which is proclaimed at 46 U.S.C. § 1902, is used extensively in the First, Second, Third, Fourth, Fifth, Ninth and Eleventh Circuits, the coast lines of which lead to the high seas on which the MDLEA operates. The MDLEA thus generates a large number of prosecutions. These ought to be uniform. At present they are not.

C. *The Ninth Circuit Decision Was Incorrect.*

Long before we developed sophisticated warships which now tempt our government to become international police by plucking foreign drug deals from the high seas, the founders of our nation recognized that one of the central defenses to our freedom was found not in such warships, even when properly used for our defense, but in a sustained insistence upon the right to trial by jury. The jury trial right, this Court has taught, is "the lamp that shows that freedom lives." *Duncan* v. *Louisiana*, 391 U.S. 145, 156, n.23, 88 S.Ct. 1444, 1451 (1968).

Present at the creation and carefully guarded ever since, the Sixth Amendment's right to trial by jury has just recently been affirmed by this Court as having no less important a function than "to guard against a spirit of oppression and tyranny on the part of rulers and . . . insisted upon by our ancestors . . . as the great bulwark of their civil liberties."

United States v. *Gaudin*, 515 U.S. 506, 510-11, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

The government feared a jury decision on whether the planned shipment of drugs in this case would have effects in the United States. It is of little wonder that the government had this fear since (1) every single charge against petitioner which alleged United States-based crimes was dismissed by the court or resulted in an acquittal by the jury and (2) the district court itself found that "the evidence does *not* establish that the conspirators intended the LUCKY STAR's load of hashish come to the United States." *Medjuck, supra*, 937 F.Supp. at 1392-93.

It is in precisely these circumstances where this Court must prevent the government's attempt at circumventing the nettlesome jury requirement with an end-run such as occurred in this case. *Gaudin* insists on nothing less. Juries are meant to nettle the central authority, at least to the extent of being "the interposition between the accused and his accuser of the commonplace judgment of a group of laymen . . . [in] that group's determination of guilt or innocence." *Williams* v. *Florida*, 399 U.S. 78, 90, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). In affirming the non-jury nexus determination, the Ninth Circuit forgot that "if the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan, supra*, 391 U.S. at 156, 88 S.Ct. at 1451.[7]

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[7] In 1996, four years after this case was indicted and five years after the charged acts allegedly occurred, Congress amended section 1903(f) to provide that all jurisdictional issues arising under this chapter are pre-

The factual issues relating to nexus are the type which normally require jury deliberation, given that they are inextricably tied to the question of guilt or innocence which is always left for the jury. Analysis of the reasoning below makes this plain. The district court[8] ruled that nexus was neither a defense nor an element of the offense and, ultimately, explained its refusal to submit nexus to the jury by quoting *1 Wright, Federal Practice and Procedure: Criminal* 2d, § 194 (1982) and cases holding "that constitutional questions which are *unrelated to guilt or innocence* are to be resolved by the court and not by the jury." 937 F.Supp. at 1376. Yet the district court's nexus findings are nothing less than a detailed recitation of evidence perceived by the court as showing Medjuck's guilt: "[T]he factual findings [for nexus] require a detailed and somewhat lengthy discussion of the details of the conspiracy. . . ." 937 F.Supp. 1382.

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liminary questions of law to be determined by the trial judge. Even if this were applied retroactively, and the new wording stretched to include the due process-based nexus defense, Congress cannot take from the jury its constitutionally-based prerogative (and the derivative right of the defendant) to have the matter decided by the jury. *See, Duncan, supra*, which held that the Constitution prevented the state from doing just that.

[8] We set forth the reasoning of the district court here because the Ninth Circuit opinion (*Medjuck II*) affirming the district court offered no reasoning.

After reciting the guilt of Medjuck for many pages, the district court's ultimate point was completely reliant on what the district court saw as Medjuck's guilt:

> Medjuck deliberately and repeatedly used the United States to plan and carry out the conspiracy to import 70 tons of hashish and had significant connections with the United States in the course of their illegal venture. While the ultimate goal of the conspiracy may have been to import hashish to Canada, it was undeniably "aimed at causing criminal acts within the United States".

937 F.Supp. at 1390-91.

Having placed such exclusive reliance on Medjuck's guilt[9] in order to find nexus, it is insupportable for the same court, with the Ninth Circuit's cursory and unreasoned affirmation, to then attempt to justify itself by stating: "[N]exus . . . is not a question of guilt or innocence and therefore, not the kind of a question that goes to the jury." 937 F.Supp. 1377.

The nexus finding is thus not at all like non-guilt related "analogous" issues cited by the court.[10] Moreover, affirma-

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[9] During its multi-page factual findings related to nexus, the district court uses the term "conspiracy" or "conspirator" 56 times, and makes numerous other references to, and findings of, criminality.

[10] The district court itself notes that the issues of selective prosecution, government misconduct, double jeopardy, voluntariness of a statement, or derivative use of immunized statements are for the court not the

tive defenses (like the defense of lack of nexus petitioner asserted below) routinely go to the jury even when, as is certainly not the case with the nexus issue so intertwined with guilt or innocence, the factual matters to be determined are wholly distinct from the elements of the offense. *See, e.g., United States* v. *Russell*, 411 U.S. 423, 436, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973) which discusses the entrapment defense:

> Entrapment is a relatively limited defense. It is rooted . . . in the notion that Congress could not have intended criminal punishment for a defendant *who has committed all of the elements of a proscribed offense* but was induced to commit them by the government. (Emphasis added.)

Mathews v. *United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988) ("entrapment presupposes the commission of a crime.")

While the entrapment issue clearly is not an element of any federal offense and does not negate the existence of any such element, entrapment goes to the jury whenever the defendant has made a preliminary showing that it is an issue in

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jury because, in resolving these issues, "guilt or innocence is immaterial." 937 F.Supp. at 1376.

the case. *Mathews, supra*, 485 U.S. at 63-64; *United States* v. *Griffin*, 434 F.2d 978 (9th Cir. 1970).

The reason that the entrapment issue goes to the jury "is because whether entrapment occurred is a factual issue; the defense of which is intertwined with the issue of intent and is often based on credibility determinations, which are traditionally reserved for jury resolution," *United States* v. *Santiago-Godinez*, 12 F.3d 722, 726 (7th Cir. 1993). Nexus is similarly intertwined with the issue of intent, since it is found to exist "where an attempted transaction *is aimed at* causing criminal acts within the United States." *Kahn, supra*, 35 F.3d at 429; *Medjuck II*, 156 F.3d 919; *Klimavicius, supra*, 144 F.3d at 1257.

The jury demarcation line is both settled and is easy to implement on a case-by-case basis. Where a factual issue depends upon a finding of guilt, or is interrelated to the question of guilt, it has always been submitted to the jury. The Ninth Circuit has previously had no difficulty drawing this line. *See, People of Guam* v. *Teixeira*, 859 F.2d 120, 123 (9th Cir. 1988), which discusses whether a court or jury should decide the entrapment defense under a Guamanian statute defining entrapment as whether the police "induced or encouraged" the crime. The Ninth Circuit noted that this definition requires examination exclusively of the conduct of the police to see whether it was offensive as a matter of policy since the government has enough to do without creating crime on its own. It was exclusively the nature of the police conduct, not its *effect* on the defendant, which was relevant to whether entrapment, as locally defined, had occurred. Accordingly, the assessment of the government conduct was for the court rather than the jury, because "proof of the defense

does not go to guilt or innocence of the accused but to the effect on law enforcement of police misconduct." *Id.* 859 F.2d at 123. (Emphasis added.)

Nexus is different. If non-resident aliens can be haled into our courts to answer drug charges carrying the mandatory harsh sentences which are now the norm, the Due Process Clause requires that there be some nexus, properly defined, between this country and the drug transaction involved. Likewise, the Sixth Amendment requires the government to prove such nexus to a jury beyond a reasonable doubt.

CONCLUSION.

For the reasons stated above, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael MEDJUCK, Defendant-Appellant.

No. 96-10347.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 9, 1997.

Decided Sept. 3, 1998.

*917 John J.E. Markham, II, Markham & Read, San Francisco, California, for defendant-appellant.

Lewis A. Davis and Mary E. Pougiales, Assistant United States Attorneys, San Francisco, California, for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California; Eugene F. Lynch, District Judge, Presiding. D.C. No. CR-91-00552-EFL.

Before: HUG, Chief Judge, GOODWIN and HAWKINS, Circuit Judges.

HUG, Chief Judge:

Appellant Michael Medjuck appeals from his jury conviction for conspiracy to possess, and possession with intent to distribute, drugs on board a vessel subject to the jurisdiction of the United States, 46 U.S.C.App. § 1903(j) & (a), and for aiding and abetting, 18 U.S.C. § 2. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Background

The facts of the case are set forth in the district court's memorandum opinion. See United States v. Medjuck, 937 F.Supp. 1368 (N.D.Cal.1996) ("Medjuck I"). We will only briefly summarize here. Medjuck was charged with participation in a far-flung conspiracy to ship and distribute some 70 tons of hashish from Pakistan to Canada and the United States on board a ship named the "Lucky Star," in violation of the Martime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C.App. § 1903. Before trial, the district court ruled that the Government need not demonstrate the existence of a nexus between the alleged drug conspiracy and the United States to proceed with the prosecution and that the Government had proven that the Lucky Star was "a vessel subject to the jurisdiction of the United States" such that the conspiracy fell within the purview of the MDLEA. Medjuck entered a conditional plea of guilty, but reserved for appellate review the issue whether the Government need demonstrate nexus in order to maintain the prosecution.

On review this court reversed Medjuck's conviction after concluding that the district court had erred by (1) failing to submit to the jury the question whether the Lucky Star was a vessel subject to United States jurisdiction, and (2) failing to require that the Government demonstrate nexus between the alleged conduct and the United States. United States v. Medjuck, 48 F.3d 1107 (9th ***918** Cir.1995) ("Medjuck II"). We remanded to the district court for further proceedings.

On remand, Medjuck argued that the question of nexus is one for the jury to determine, rather than the court. At Medjuck's request, the district court deferred ruling on the issue until Medjuck's Rule 29 motion. Medjuck also objected to the introduction of videotaped testimony of two Canadian witnesses, on the grounds that the admission of such testimony denied him his Sixth Amendment right to confront witnesses against him.

A jury convicted Medjuck on three counts of violation of the MDLEA. The district court denied the Rule 29 motion, concluding that nexus was a question for the court and not the jury, and that the Government had met its burden of demonstrating nexus by a preponderance of the evidence. See Medjuck I, 937 F.Supp. at 1370. This appeal followed.

Discussion

Medjuck presents several arguments for reversal of his convictions. He first contends that the district court erred by deciding the nexus question, rather than submitting it to the jury. He also contends that the district court improperly de-

fined nexus, and erred in determining that the Government had demonstrated a sufficient nexus. Finally, he contends that the district court erred when it allowed the introduction of the videotaped testimony. We address each argument in turn.

I. The Nexus Requirement

The MDLEA prohibits possession, manufacture, or distribution of illicit drugs on board a "vessel subject to the jurisdiction of the United States." 46 U.S.C.App. § 1903. A "vessel subject to the jurisdiction of the United States" is defined as either (1) a vessel without nationality; (2) a vessel assimilated to a vessel without nationality; (3) a vessel registered in a foreign nation where the nation of registration consents to the United States' enforcement of its laws on board that ship; (4) a vessel located in the customs waters of the United States; or (5) a vessel located in the territorial waters of another nation where that nation consents to enforcement of United States laws by United States authorities. Id. at § 1903(c).

[1][2] In addition to the statutory jurisdictional element, we require that, in order for extraterritorial application of United States penal statutes, such as the MDLEA, to satisfy the strictures of due process, the Government demonstrate that there exists "a sufficient nexus between the conduct condemned and the United States" such that the application of the statute would not be arbitrary or fundamentally unfair to the defendant. Medjuck II, 48 F.3d at 1111; see also United States v. Davis, 905 F.2d 245, 248-49 (9th Cir.1990).

The district court determined that the nexus question was one for the court and not the jury, and concluded that the Government had met its burden in this regard by demonstrating nexus by a preponderance of the evidence. See Medjuck I, 937 F.Supp. at 1370.

[3] Medjuck now contends that the jury and not the court must decide whether nexus has been established. He further contends that the district court improperly defined nexus, and he attacks as erroneous the district court's conclusion that a sufficient nexus was demonstrated in this case.

We recently concluded that nexus is not an element of the offense and that the nexus issue is properly decided by the judge. See United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir.1998). Thus, the district court did not err by deciding the nexus issue instead of submitting it to the jury.

In deciding the nexus issue, the district court defined "nexus" according to United States v. Caicedo, 47 F.3d 370, 372 (9th Cir.1995) as "a connection between the criminal conduct and the United States sufficient to justify the United States pursuit of its interests." Medjuck I, 937 F.Supp. at 1381 (internal quotations omitted). Medjuck argues that the proper definition of nexus comes instead from United States v. Khan, 35 F.3d 426, 429 (9th Cir.1994), which states that "[t]o meet the nexus requirement, the government must show that the plan for shipping *919 the drugs was likely to have effects in the United States."

While the language of Caicedo and Khan are not in conflict, the definition provided by Khan is more precise and was recently followed by this court in Klimavicius-Viloria, 144 F.3d at 1257. In Klimavicius-Viloria, we stated that there is sufficient nexus "where an attempted transaction is aimed at causing criminal acts within the United States. More specifically, there is sufficient nexus where the plan for shipping the drugs was likely to have effects in the United States." Id. (internal quotations and citations omitted). This definition clearly encompasses conspiracies that plan the shipment of drugs that are destined for the United States. See Khan, 35 F.3d at 429 (conspiracy included backup landing site in the United States and primary plan to transport drugs to New York); United States v. Aikins, 946 F.2d 608, 614 (9th Cir.1990) (operation was designed to bring offloaded marijuana into the United States); Davis, 905 F.2d at 249 (defendant intended to smuggle contraband into United States territory); United States v. Peterson, 812 F.2d 486, 493 (9th Cir.1987) ("substantial evidence that the drugs were bound ultimately for the United States").

In this case, the district court found that the conspirators did not intend to deliver the drugs directly into the United States. It did conclude, however, "that both economics and geography dictate that at least some portion of the hashish would at some point be found in the United States." Medjuck I, 937 F.Supp. at 1394. The testimony of Sergeant Jean Martin of theRoyal Canadian Mounted Police supports the district court's finding that some portion of the drugs would enter the United States, therefore, the district court's finding of fact on this point is not clearly erroneous.

Furthermore, the district court concluded that Medjuck had direct and indirect contacts with United States in furtherance of the conspiracy. See Medjuct I, 937 F.Supp. at 1388-94. Medjuck knowingly directed his agent to use the United States to plan and conduct the conspiracy, and he himself conducted some of the business of the conspiracy from the United States. See id. at 1388. For example, Medjuck sent his agent to the United States to locate and deliver money to a boat captain in order to hire a boat and crew to meet the Lucky Star on the high seas and offload 70 tons of hashish. See id. Medjuck also made arrangements himself using telephone calls and personal meetings in the United States. See id. at 1390. Because entry of the drugs into the United States and the coordination and control of the conspiracy in the United States "was likely to have effects in the United States" and to "caus[e] criminal acts within the United States" there is a sufficient basis to find that the government established nexus. Klimavicius-Viloria, 144 F.3d at 1257.

II. Admission of Videotaped Testimony

Medjuck contends that the district court erred when it admitted videotaped testimony from three Canadian witnesses. He argues that the admission of the testimony denied him his rights under the Sixth Amendment and Fed.R.Crim.P. 15 to confront those witnesses face-to-face.

[4] Fed.R.Crim.P. 15(a) allows the Government in "exceptional circumstances," to depose its own witnesses in order to preserve that testimony for trial. Rule 15(b) provides that "the officer having custody of a defendant" shall

"produce the defendant at the examination and keep the defendant in the presence of the witness during the examination" unless the defendant waives this right in writing. The Sixth Amendment Confrontation Clause "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v. Iowa, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).[1] Neither rights is absolute; courts have permitted depositions to be taken and introduced at trial without the presence of the defendant at the depositions.

[5][6] When the government is unable to secure a witness's presence at trial, rule 15 is not violated by the admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant's physical presence at the deposition and, failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings. See United States v. Gifford, 892 F.2d 263, 265 (3d Cir.1989); United States v. Salim, 855 F.2d 944, 950 92d Cir.1988). Here, the Canadian witnesses were unavailable for trial because they were beyond the subpoena power of the United States and refused voluntarily to attend. The Government was unable to secure Medjuck's presence at the Canadian depositions because there was no mechanism in place to allow United States offi-

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[1] The Confrontation Clause serves several purposes: "(1) ensuring that witnesses will testify under oath; (2) forcing witnesses to undergo cross-examination; and (3) permitting the jury to observe the demeanor of witnesses." United States v. Sines, 761 F.2d 1434, 1441 (9th Cir.1985).

cial to transfer Medjuck over the Canadian authorities at the Canadian border, and secure his return to the United States in a timely fashion after the depositions.[2]

Finally, the Government set up an elaborate system to allow Medjuck to witness the depositions live by video feed and to participate with his attorneys be private telephone connection during the depositions taken in Canada. The proceedings were videotaped. Medjuck's level of involvement was sufficient under Salim and Gifford.

We conclude that the district court did not err in finding that the Government satisfied the requirements for the exception to Rule 15's presence requirement.

2. Confrontation Clause

[7] The Supreme Court has recognized an exception to a defendant's confrontation rights "where denial of such confrontation is necessary to further an important public policy and . . . the reliability of the testimony is otherwise assured." Maryland v. Craig, 497 U.S. 836, 850, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). More specifically, an exception has

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[2] The district court found that United States officials were unable to maintain custody over Medjuck while in Canada. The district court further found that because Medjuck was wanted in Canada on drug smuggling charges stemming from the same conspiracy that formed the basis of the instant prosecution, he would have been arrested and tried in Canada once he arrived there, and possibly not returned to the United States until after trial and, possible, after serving a sentence in Canada. We find no error in these findings.

been recognized for admission of deposition testimony where a witness is unavailable to testify at trial; the Third Circuit has set forth a test for determining whether deposition testimony falls within that exception. See United States v. Kelly, 892 F.2d 255, 261 (3d Cir.1989).

First, the deposition testimony must fall within "an established exception to the hearsay rule." Id. Second, the deposition must be taken "in compliance with law." Id. at 262.[3] Finally, the defendant must have had an opportunity to cross-examine the deposed witnesses. Id.

This court has held that before the "Confrontation Clause's 'preference for face-to-face confrontation' "may be avoided by resort to telephonic participation, the Government "must first attempt to secure the defendant's actual, physical presence" at the deposition. Christian v. Rhode, 41 F.3d 461, 467 & n. 8 (9th Cir.1994) (emphasis in original). In Christian, the Arizona State government had "made no effort whatsoever" to secure the defendant's presence at the depositions. Id. at 466. Without establishing a specific test for what the government must do to qualify for an exception to the Confrontation Clause, the court held "that the state must do something in its attempt to secure the defendant's presence." Id. at 467 (emphasis in original).

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[3] This element of the test incorporates the analysis of the propriety of deposition testimony under Rule 15.

We conclude that the Government satisfied Christian's requirement that it attempt to secure the defendant's actual presence, by virtue of its demonstration of the impossibility of obtaining Medjuck's physical presence on terms acceptance to the Government. There is no requirement that the Government go through a futile exercise before it may proceed to arrange for a defendant's remote participation.

*921 With regard to the requirements set forth in Kelly, supra, we conclude that (1) the videotaped testimony qualified for F.R.E. 804(b)(1) (unavailability exception); (2) Medjuck's level of participation was adequate to afford him ample opportunity to cross-examine the witnesses; and (3) the depositions were taken in accordance with Rule 15, as discussed above.

We conclude that the district court did not err in admitting the videotaped testimony of the Canadian witnesses.

AFFIRMED.

APPENDIX B.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 15 1998
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)
	) No. 96-10347
Plaintiff-Appellee,	)
	) D.C. No. CV-89-3630-RG
	)
v.	)
	)
MICHAEL MEDJUCK,	) ORDER
	)
Defendant-Appellant,	)
	)

Before: HUG, Chief Judge, GOODWIN and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are denied.

APPENDIX C.

UNITED STATES CODE ANNOTATED TITLE 46 APPENDIX. SHIPPING CHAPTER 38–MARITIME DRUG LAW ENFORCEMENT

§ 1903. Manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels

(a) Vessels of united States or vessels subject to jurisdiction of United States

It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States, or who is a citizen of the United States or a resident alien of the United States on board any vessel, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

(b) "Vessel of the United States" defined

For purposes of this section, a "vessel of the United States" means—

(1) a vessel documented under chapter 121 of Title 46 or a vessel numbered as provided in chapter 123 of that title;

(2) a vessel owned in whole or part by—

(A) the United States or a territory, commonwealth, or possession of the United States;

(B) a State or political subdivision thereof;

(C) a citizen or national of the United States; or

(D) a corporation created under the laws of the United States or any State, the District of Columbia, or any territory, commonwealth, or possession of the United States;

unless the vessel has been granted the nationality of a foreign nation in accordance with article 5 of the 1958 Convention on the High Seas and a claim of nationality or registry for the vessel is made by the master or individual in charge at the time of the enforcement action by an officer or employee of the United States authorized to enforce applicable provisions of the United States law; and

(3) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was either sold to a person not a citizen of the United States or placed under foreign registry or a foreign flag, whether or not the vessel has been granted the nationality of a foreign nation.

(c) "Vessel subject to the jurisdiction of the United States" and "vessel without nationality" defined; claim of nationality or registry

(1) For purposes of this section, a "vessel subject to the jurisdiction of the United States" includes—

(A) a vessel without nationality;

(B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) or article 6 of the 1958 Convention on the High Seas;

(C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States;

(D) a vessel located within the customs waters of the United States; and

(E) a vessel located in a territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States.

Consent or waiver of objection by a foreign national to the enforcement of United States law by the United States under subparagraph (C) or (E) of this paragraph may be obtained by radio, telephone, or similar oral or electronic means, and is conclusively proved by certification of the Secretary of State or the Secretary's designee.

(2) For purposes of this section, a "vessel without nationality" includes—

(A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed;

(B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and

(C) a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

A claim of registry under subparagraph (A) or (C) may be verified or denied by radio, telephone, or similar oral or electronic means. The denial of such claim of registry by the claimed flag and is conclusively proved by certification of the Secretary of State or the Secretary's designee.

(3) For purposes of this section, a claim of nationality or registry only includes:

(A) possession on board the vessel and production of documents evidencing the vessel's nationality in accordance with article 5 of the 1958 Convention on the High Seas;

(B) flying its flag nation's ensign or flag; or

(C) a verbal claim of nationality or registry by the master or person in charge of the vessel.

(d) Claim of failure to comply with international law; jurisdiction of court

Any person charged with a violation of this section shall not have standing to raise the claim of failure to comply with international law as a basis for a defense. A claim of failure to comply with international law in the enforcement of this chapter may be invoked solely by a foreign nation, and a failure to comply with international law shall not divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this chapter.

(e) Exceptions; burden of proof

This section does not apply to a common or contract carrier or an employee thereof, who possesses or distributes a controlled substance in the lawful and usual course of the carrier's business or to a public vessel of the United States, or any person on board such a vessel who possesses or distributes a controlled substance in the lawful course of such person's duties, if the controlled substance is a part of the cargo entered in the vessel's manifest and is intended to be lawfully imported into the country of destination for scientific, medical, or other legitimate purposes. It shall not be necessary for the United States to negative the exception set forth in this subsection in any complaint, information, indictment, or other pleading or in any trial or other proceeding. The burden of going forward with the evidence with re-

spect to this exception is upon the person claiming its benefit.

(f) Jurisdiction and venue

Any person who violates this section shall be tried in the United States district court at the point of entry where that person enters the United States, or in the United States District Court of the District of Columbia. Jurisdiction of the United States with respect to vessels subject to this chapter is not an element of any offense. All jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

(g) Penalties

(1) Any person who commits an offense defined in this section shall be punished in accordance with the penalties set forth in section 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 960).

(2) Notwithstanding paragraph (1) of this subsection, any person convicted of an offense under this chapter shall be punished in accordance with the penalties set forth in section 1012 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 962) if such offense is a second or subsequent offense as defined in section 1012(b) of that Act.

(h) Extension beyond territorial jurisdiction of United States

This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.

(i) Definitions

The definitions in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) apply to terms used in this chapter.

(j) Attempt or conspiracy

Any person who attempts or conspires to commit any offense defined in this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.